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UNITED STATES SUPREME COURT.

OCTOBER TERM, 1892.

TERM No. 1106.

SUSAN LUXTON, PLAINTIFF IN ERROR,

vs.

THE NORTH RIVER BRIDGE COMPANY.

Brief of the Plaintiff in Error.

GILBERT COLLINS, Jersey City, N. J.,
Attorney and Counsel.

UNITED STATES SUPREME COURT.

SUSAN LUXTON, Plaintiff in Error, *vs.* THE NORTH RIVER BRIDGE CO., Defendant in Error.	In Error to Circuit Court, District of New Jersey.

ARGUMENT FOR PLAINTIFF IN ERROR.

The North River Bridge Company was incorporated by Act of Congress in the year 1890. (26 U. S. Stat. at Large, p. 268.) It authorizes the construction of a bridge over the Hudson River between New York and New Jersey, and contains provisions for the taking of land for approaches by condemnation in the United States Circuit Court. An application was made to that Court to condemn certain city lots, in Hoboken, of the plaintiff in error, for an approach to the bridge. The Circuit Court sustained the application and appointed Commissioners to condemn, by order dated on the nineteenth day of April, A. D. 1892. This writ of error is brought to review the order of appointment.

I.

THIS COURT HAS JURISDICTION TO REVIEW THE ORDER APPOINTING COMMISSIONERS TO CONDEMN.

The Charter of the North River Bridge Company passed in 1890 (26 U. S. Stat at Large, 268), provides (at close of § 4), that applications for condemnation shall be made in the United States Circuit Court, and the proceedings shall conform to the practice in the State Court in cases of condemnation for railroads.

The New Jersey State Practice thus adopted is found in the General Railroad Act of 1873 (N. J. Rev., p. 928, § 100). Under this act a Justice of the Supreme Court, on petition, notice and hearing, makes an order of appointment of Commissioners to assess damages, which order is a final adjudication that the petitioner has power to take, and that the property described is liable to be taken.

Lewis, Em. Dom., § 388.

The only question left open is that of the amount of damages, which is decided by the Commissioners. Their report is not made to the Court, nor does it require any confirmation. It is filed by the Commissioners in the office of the County Clerk, and operates as a deed, taking effect upon payment of the award, as of the date of filing. Hetfield *v.* C. R. R. 29, N. J. L. 571, 573, 574; Taylor *v.* N. Y. & L. B. R. R. 38, N. J. L. 28. An appeal may be taken to a Court and jury, but on this appeal the only question open is the amount of damages (N. J. Rev. 929, § 101).

This statute has been often considered in New Jersey and it has been settled that the order of appointment is a final judgment, and that it is subject to review as such.

State, Morris & Essex R. R. *v.* Hudson Tunnel Co., 9 Vr. 548, 550.

The mode of review in New Jersey is by certiorari, and not by writ of error, for the reason that the order of appointment is not made by a Court, but by a Justice of the Supreme Court, exercising a special statutory jurisdiction. Under the charter of The North River Bridge Company this jurisdiction is placed not in a Justice, but in the United States Circuit Court. The proper writ to review this judgment of the Circuit Court is of course a writ of error.

A like practice under a similar statute is followed in Michigan.

Clay *v.* Pennoyer, &c., Co., 34 Mich., 204.

The order of appointment being thus held to be a final judgment by the State Court, this Court will hold the same, and the writ of error will lie.

Wheeling Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287.

That a proceeding to condemn in the United States Circuit Court is a suit at common law, was held in Kohl *v.* U. S., 91 U. S., 367.

II.

CONGRESS CANNOT CONFER THE RIGHT OF EMINENT DOMAIN UPON A PRIVATE COMPANY TO TAKE LAND IN A STATE FOR A BRIDGE.

It will hardly be contended that the power to construct this bridge is conferred by the power to establish post roads. In the language of Mr. Justice Grier: "Congress may establish post offices and post roads, but this does not affect or control the absolute power of the State over highways and bridges."

Milnor *v.* N. J. R. R., Vol. 16, U. S. Sup. Ct. Rep., Lawyers' Ed., 799, 806.

The argument that Congress may authorize the building of bridges over navigable waters has always been based on the power to regulate commerce. It rests for authority almost entirely on dicta of the late Justice Bradley. This is high authority, but not so high as to preclude careful consideration in this Court of the important constitutional question now for the first time, as we think, fairly presented by the case before the Court and requiring decision.

The claim here is of the right of eminent domain to take lands within a State for an approach to a bridge, under an Act of Congress. We know of no decision where any such right has been sustained. As was said in King *v.* Am. Transfer Co., 1 Flip Cir. Ct., 1, the rulings have rather tended to the doctrine that the power of Congress over commerce does not operate on lands in a State.

Dicta in favor of the existence of the power are found in the opinions of Justice Bradley, in Stockton *v.* Baltimore & N. Y. R. R., 32 Fed. Rep., 9, 19; and in Cal. *v.* Central Pacific R. R. Co., 127 U. S., 1, 39; but we have yet to find a case where the exercise of eminent domain in a State has been drawn in question and sustained under an act of Congress for such purpose.

In Pensacola Tel. Co. *v.* Western Union Tel. Co., 6 Otto, 1, the Court sustained a grant by Congress to all telegraph companies of a right to use the military and post roads of the United States, but Ch. J. Waite said: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made." * * * * ** * * *

No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

That the State might authorize the construction of the bridge and approaches in question to the boundary line, and might confer the power of eminent domain for that purpose is undoubted. Such power for such purposes has been often exercised. The power of eminent domain when thus exercised by the State is be-

yond federal control. The subject matter is one of which the United States Courts cannot take jurisdiction.

West River Bridge Co. *v.* Dix, 6 How. 507, 533, 535.
Balt. & O. R. R. *v* Pittsburg &c. R. R. 17 W. Va. 812, 866, approved by Brewer, J., in.
Col. Mid R'y Co. *v.* Jones, 29 Fed. Rep. 193.

In the language of Mr. Justice Field in Boom Co. *v* Patterson, 8 Otto, 403, "The proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments." If, however, Congress can confer the power of eminent domain for a bridge, such power must interfere with that conferred by the State for the same purpose. Suppose a charter like that of the defendant in Error should be granted by concurrent legislation of the States of New Jersey and New York to another company than defendant and the company so constituted should acquire land needed for the bridge. Could the defendant in error condemn that land and take it from the State Company? If the power to condemn for such purpose exists at all in Congress, it must be paramount, and the State in the exercise of the power of eminent domain within its own territory for a legitimate purpose is not sovereign, but subordinate to the power of the Federal Government for the same purpose.

In Milnor *v.* N. J. R. R. & T. Co. found with briefs of Counsel in Vol. 16, U. S. Sup. Ct. Reports, Lawyers Ed., page 799, 806—Justice Grier laid down the following principles: "Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges and railroads are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them. Congress may establish post offices and post-roads, but this does not affect or control the absolute power of

the State over highways and bridges. * * * The police power to make bridges over its public rivers is as absolutely vested in a State as the commercial power is in Congress."

The judgment was affirmed by an equally divided Court. It is curious to observed that among the Counsel by whom the exclusive jurisdiction of the State over bridges was maintained (p. 801), was Mr. Bradley, afterwards Justice of this Court, whose opinion in Stockton *v.* Balt. & N. Y. R. R., is now the chief support of the opposite doctrine; we might almost say the only support, for in the cases in the Supreme Court where similar views have been expressed the question was not necessarily decided. In fact, the question of the power of eminent domain was not strictly involved in Stockton *v.* Balt & N. Y. R. R. Co. The private rights in land required for the bridge then under consideration had been acquired by grant.

The bridge in question in Milnor *v.* N. J. R. R. & T. Co crossed the Passaic River and was not therefore a bridge between two States, but the precedent is not the less pertinent for our purpose. The power to construct such a bridge as that now proposed across navigable water between two States cannot logically be sustained under the power to regulate commerce except upon principles which would authorize such construction across a navigable stream within a State. One is as necessary to interstate commerce as the other. Every part of the structure is within one State or the other, and forms part of an interstate means of communication, and the same thing is true of every railroad connecting Pennsylvania with New York City.

That portion of the soil of New Jersey which lies between the center of the Hudson River and Bergen Heights, is not more essential to be used as an instrument of interstate commerce than is that portion which lies between the banks of the Passaic which is crossed by nearly every railroad connecting New York City with the West.

The interpretation of the constitution necessary to sustain the charter in question has often been expressly repudiated by eminent judges of this Court.

In Gibbons *v.* Ogden, 9 Wheat. 1, 203, it is distinctly conceded that the power to establish ferries between the States has not been surrendered to the Federal Government: and is not included in the powers conferred to regulate commerce. The argument is equally strong as to bridges.

> See State *v.* Freeholders of Hudson, 3 Zab., 206; S. C., 4 Zab., 718, 728.

In Pollard *v.* Hagan, 3 How. 212, 223, the law was stated in these terms: "The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted." And the Court specifies as granted the cases referred to in the 16th clause of the 8th section of Article I., which does not include the power to regulate commerce.

This decision was cited with approval by Swayne, J., in Gilman *v.* Philadelphia, 3 Wall., 713, who says: "The power to authorize the building of bridges is not to be found in the Federal Constitution It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still."

In U. S. *v.* R. R. Bridge Co., 6 McL., 517, 524, McLean, J., said that Congress had no power to construct a bridge over a navigable water. "This belongs to the local State authority within which the work is to be done."

In Wheeling Bridge Case, 18 How., 421, 436, McLean, J., said: "If under the commercial power Congress may make bridges over navigable waters, it will be difficult to find any limitation to such power. Turnpike roads, railroads and canals might on the same principle be built by Congress. So extravagant and absorbing a federal power as this has rarely, if ever, been claimed by any one, but if the power be found in the Constitution no principle is perceived by which it can be practically restrained. This dilemma leads us to the conclusion that it is not a consti-

tutional power." This was a minority opinion, but the majority did not express disagreement with Justice McLean upon this point.

In Newport & Cinn. Bridge Co. *v.* U. S. 105, U. S. 470, Field, J., approved the foregoing language of Justice McLean. This opinion of Justice Field was also a minority opinion, but in that case the bridge in question was authorized by a State law, so that the Court did not necessarily pass upon the extent of the power of Congress.

The simple provision of the Constitution is that Congress shall have power "to regulate commerce."

Chief Justice Marshall, in Gibbon agst. Ogden (9 Wheat., 190), says commerce is intercourse and "is regulated by prescribing rules for carrying on that intercourse." And again in the same case he says (page 196): "What is this power? It is the power to regulate, that is, to prescribe the rules by which commerce is to be governed." Is it reasonable to say that the power to prescribe a rule implies the power to build a bridge? In the same case (p. 227) Mr. Justice Johnson also defines the power to regulate commerce. He says: "The law of nations regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure."

How remote from this conception of the power to regulate is that contended for by defendant in error. If Congress can confer upon a corporation the powers set forth in the act under consideration, then Congress can exercise those powers through the direct agency of the national government. This result indeed is by no means avoided by Mr. Justice Bradley. He classes together the "power to construct or to authorize individuals or corporations to construct national highways and bridges from State to State."

Cal. agst. Cent. Pac. R. R., 127 U. S., 1, 39.

Statutes conferring power to regulate were familiar when the Constitution was framed; in municipal charters it has always been the usage to confer power to regulate certain matters by ordinance, and so in drafting the national charter power is given to Congress to regulate certain matters by statute. Should not the term "power to regulate" receive the same interpretation whether it is found in the charter of a city or in the great charter of a nation? A common power in a city charter is to regulate the running of locomotives and cars within the limits of the city. Does this give the city power to construct and operate railroads? Under a power to regulate ferries can a Board of Aldermen establish a ferry or confer a ferry franchise? Such powers are sometimes given to a municipal government, but they are not given by the power to regulate. Under a power to regulate the sale of liquor can a city government sell liquor or set up a saloon or an agency of the city to sell it?

Many States have placed the regulation of railroads in the hands of commissioners, but it has never been imagined that under the power to regulate, commissioners could construct or confer power to construct railroads.

When the Constitution provides that Congress shall have power to regulate commerce between the States, does this mean that Congress may promote and facilitate commerce, may provide bridges between the States, may create corporations for their construction and operation, and may authorize such corporations to hold lands in the State, and not only to hold lands, but to take lands by eminent domain. We think that this Court has not yet said as much as this, that the weight of judicial authority is against it, and that the Constitution will not fairly bear this interpretation.

Submitted on printed argument under the Rule.

Gilbert Collins *Counsel for Plaintiff in Error.*

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SUSAN LUXTON,

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Defendant in Error.

In Error to the U. S. Circuit Court for the District of New Jersey.

No. 1106 of October Term, 1892.

Argument of

JOSEPH D. BEDLE,

Counsel for Defendant in Error.

DOAN & PILSON, Printers, 54 Montgomery St., Jersey City.

United States Supreme Court.

SUSAN LUXTON, Plaintiff in Error, *vs.* THE NORTH RIVER BRIDGE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

No. 1106 of October Term, 1892.

ARGUMENT FOR DEFENDANT IN ERROR.

It is difficult to argue this case, for the reason that I regard the only question raised by the plaintiff in error as too well settled to admit of doubt.

1.

The North River Bridge Company is incorporated under the Act of Congress to construct a bridge across the Hudson River between the States of New York and New Jersey, "and to lay tracks thereon for the connection of the railroads on either side of said river, in order to facilitate inter-state commerce in the transportation of persons and property, and for vehicle, pedestrian, postal, military, and other purposes;"

Sec. 1 of the Act. By Section 3 it is provided "that the bridge, with its approaches and railroad thereover, constructed under the provisions of this act, shall be a lawful structure, and a military and post road, but no toll charges shall be made for the transmission over the same of the mails of the United States, or for the right of way for United Statss postal telegraph purposes." The persons named in the act, and their associates, are thereby created a corporation, with power to exercise the right of eminent domain as therein provided. The public purposes of the act are clearly stated, and they are within the scope of the Constitution of the United States. It is unnecessary to make further reference to the particulars of the said act, but attention is called to the same without further repetition here.

2.

It cannot be denied that Congress has full power to charter corporations as an appropriate means of carrying out any of the authorized purposes of the Federal government. Morawetz on Corporations, § 9, and notes; also § 984. This proposition need not be argued, or the cases referred to which recognize it. To accomplish the purposes of the Constitution of the United States, Congress may create a corporation as its own instrumentality, or confer franchises upon corporations of the States for the same purposes. There is no difference in principle.

3.

As a fact, nothing can be clearer than that this bridge is intended to facilitate commerce between the

States, and to be used for postal and military purposes. The power to regulate commerce is amply sufficient to maintain this act, although the other purposes alike justify it.

While it may not be denied that the corporation is lawfully created by the Act of Congress to construct this bridge as a great instrument of commerce, it seems to be contended, that the right of eminent domain cannot be conferred upon the corporation to take lands within the State for the necessary abutments, which are a part of the bridge. That the abutments are a necessary part of the structure, is not denied, but it is claimed that Congress is impotent to carry out the work by the exercise of the power of eminent domain. In other words, that it has no such power. The mere statement of this proposition of the other side, is its own refutation. The law is to the contrary, and should be regarded as settled. Reference is made to the following cases:

91 U. S., 367, Kohl et al. *vs.* United States.
135 U. S., 641, Cherokee Nation *vs.* Kansas Railway Company.

In connection with this case, see opinion of Mr. Justice Bradley in Stockton *vs.* Baltimore & N. Y. R. Co., 32 Fed. Rep., 9. Also opinion of same Judge in 127 U. S., page 39, California *vs.* Pacific Railroads. I make reference also to the cases on page 656, in opinion of Mr. Justice Harlan, Cherokee Nation case. See also 30 Fed. Rep. 723, Decker *vs.* Baltimore & N. Y. R. Co., Judge Wallace.

It is unnecessary for me to go over these cases in detail, or to refer to others, which by *dicta* and general

principles declared, sustain the right of Congress to confer the power of eminent domain; but it is sufficient for me to say that in view of the well recognized action of Congress by this Court, in bestowing franchises for like purposes as this corporation, including the power of eminent domain, it is too late now to question the constitutionality of this act. The principles involved should be regarded as conclusively settled against the plaintiff in error, and the judgment of the Circuit Court be affirmed.

The act in question contemplates a structure of great national importance, and the powers therein were conferred in the light of the adjudications of this Court.

This case is respectfully submitted upon printed arguments under the rule.

JOSEPH D. BEDLE,
Counsel for Defendant in Error.

Joseph D. Bedle
Counsel for Def'n